No. 78-51

Supreme Court, U. S.
FILED
SEP 25 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

J. RAY MCDERMOTT & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

ROBERT E. ALLEN,
Acting Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

Page

Cases—continued:

National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U.S. 206 8-9

National Labor Relations Board v. *Wyman-Gordon Co.*, 394 U.S. 759 8

Statute:

National Labor Relations Act, (61 Stat. 136, 73 Stat. 519, as amended, 29 U.S.C. 151, *et seq.*):

Section 8(a)(1) 6

Section 8(a)(5) 6

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-51

J. RAY MCDERMOTT & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is not yet reported. The decision and bargaining order of the National Labor Relations Board (Pet. App. 21a-36a) are reported at 227 NLRB 1347. The Board's certification of representation decision (Pet. App. 57a-72a) is unreported. The Board's decision and order amending the certification of representation are reported at 223 NLRB 857.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on May 10, 1978. The petition for a writ of certiorari was filed on July 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly certified the results of a mail ballot in the underlying representation proceeding.

2. Whether the Board properly amended the certification of representation to reflect the bargaining agent's change in affiliation from one to another international union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-3.

STATEMENT

1. The International Association of Professional Divers (IAPD) was established in 1970 as a labor organization for the purpose of organizing professional divers working along the Gulf Coast (Pet. App. 2a). In February 1974 the IAPD affiliated with the Marine Engineers Beneficial Association (MEBA), an international union. Later that year IAPD-MEBA requested the Board to hold a representation election among petitioner's employees (Pet. App. 3a). Because the employees were dispersed over a wide geographic area, the Board's Regional Director ordered that the election be conducted by mail.[1] On January 15, 1975, ballots were sent from the Board's Regional Office by United States mail to 86 eligible voters, with instructions that the ballots be returned no later than February 26, 1975 (Pet. App. 3a, 57a, 62a-64a). The vote count taken after the February 26 deadline was

[1]An earlier mail ballot election was held in the Spring of 1974; the Union won that election but the Board set it aside based on employer objections to Union conduct. 215 NLRB 570. The second election ordered by the Board is the one involved in this case.

39 for IAPD-MEBA, and 36 against. Six ballots were challenged by petitioner, and were not counted; one employee lost his ballot return envelope and was unable to secure a replacement in time to vote by the deadline; and the ballots of three employees were not received (Pet. App. 3a, 57a-58a).

2. On the basis of these results, the Board denied petitioner's request for review of the Regional Director's Second Supplemental Decision and Certification of Representation and approved certification of IAPD-MEBA as the collective bargaining agent for petitioner's employees (Pet. App. 26a). The Regional Director had rejected petitioner's contention that the election should be set aside because the ballots of three employees were never received by the Regional Office. He found that either the Post Office had lost the ballots of the three employees; or the three had failed to mail them, or mailed them improperly. In concluding that the missing ballots should not result in the invalidation of the election, the Regional Director pointed out that "regardless of what happened to the ballots, it is obvious that their disappearance was not due to any action or inaction by the parties, nor was it due to unfairness in the scheduling or mechanics of the election" (Pet. App. 70a). Noting that "there must be some finality to the results of an election" (*ibid.*), and relying on the policy that failure of some employees to cast ballots will be a basis for setting aside an election only where the circumstances causing the failure are "within the control of one of the parties to the proceeding or * * * arise out of unfairness in the scheduling or mechanics of the election" (Pet. App. 69a), the Regional Director certified the union as the employees' representative.[2]

[2]The Regional Director sustained four of the six voter challenges brought by petitioner, and those ballots were not counted. The

3. On July 3, 1975, Paul Woodhall, president of the IAPD-MEBA, wrote to petitioner requesting that contract negotiations commence. A week later petitioner responded by refusing to bargain, asserting that the Board's certification was invalid (Pet. App. 26a).

In the meantime, officers of IAPD-MEBA were becoming dissatisfied with the support they were receiving from MEBA (223 NLRB 857). On July 7, 1975, letters were sent to the membership announcing the regular quarterly meeting for July 11 and stating that the IAPD executive committee would "present for consideration and vote a resolution to disaffiliate" from MEBA and that "an opportunity for consideration of affiliation with another international union [would] be given" (*ibid*). In addition, members were contacted personally and by telephone to remind them of the forthcoming meeting (*ibid.*).

The July 11 meeting was limited to IAPD-MEBA members. Following a discussion of the disaffiliation and affiliation issues, those attending voted, by secret ballot, 77 to 1 to disaffiliate from MEBA and 76 to 2 to affiliate with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters). After the meeting was adjourned, an officer of the Carpenters presented IAPD with a charter to become Local 1012 of the Carpenters (Pet. App. 5a, 223 NLRB at 858).

The IAPD (now Local 1012) then took steps to conduct a vote among employees of units that it represented to ratify the transfer of affiliation. One of the units was that

---

remaining two challenges were rejected, but the ballots of those two employees were not opened, because they could not have altered the outcome of the election. (Pet. App. 60a-61a.) The Director also rejected petitioner's objection concerning the employee who lost his return envelope (Pet. App. 70a). These rulings are not challenged in the petition for certiorari.

of petitioner's employees. Under a mail ballot procedure like that used earlier by the Board, the materials sent to the employees contained a statement explaining what had occurred at the July 11 meeting, instructions for voting, a ballot, a ballot envelope, and a return envelope. The return envelope was addressed to Local 1012 at a post office box, and had a place for each employee to sign his name and address. The employee was instructed to mark the ballot, place it into the ballot envelope, and mail it in the return envelope within 30 days. A neutral party was designated to receive the ballots and count the votes. Of petitioner's 101 employees at the time of the vote, 60 properly returned ballots; 54 voted for transfer of affiliation to the Carpenters, and 6 voted against the transfer (223 NLRB at 858, Pet. App. 5a-6a). Following the counting of the ballots, Local 1012 formally requested the Board to amend the certification to designate it in place of IAPD-MEBA as the representative of petitioner's employees.

5. The Board granted Local 1012's request over petitioner's objection (223 NLRB 857). The Board rejected petitioner's contention that Local 1012 was not substantially the same entity as IAPD, finding that Local 1012 retained "the right to negotiate its own collective bargaining agreements and process its own grievances through the same elected individuals who led the organization under its old name," and that the dues structure had remained exactly the same as before (223 NLRB at 859). The Board concluded that "Local 1012 is functionally the same organization as the certified representative and * * * the nature of the relationship between the local and each of the two International affiliates is substantially the same" (*ibid*). The Board also rejected petitioner's contention "that the procedures used by IAPD to change its affiliation did not give the

membership adequate opportunity to consider and vote on the question" (*ibid.*). The Board found that "adequate notice and opportunity to discuss the matter was accorded to all the membership" and that the voting procedures at the July 11 meeting were fair (*id.* at 860). Noting that Local 1012 "achieved majority approval [from the unit employees] even though the [Company] refused to cooperate by furnishing a current list of employees" (223 NLRB at 860 n. 15), the Board concluded that (223 NLRB at 860)

> a mail balloting procedure was an appropriate method to obtain the views of the employees herein since the nature of their work is such that they are offshore for significant periods of time and the Board itself used mail ballots in these bargaining units. We see no deficiency in the wording of the ballots. The transfer of affiliation had in fact been accomplished; it was necessary merely to secure ratification of the transfer of bargaining rights by a majority of each bargaining unit. In addition, we believe that efforts to insure the secrecy of the ballot were adequate. [footnote omitted.]

Thereafter, petitioner refused to bargain with Local 1012, a refusal which the Board found to be violative of Section 8(a)(5) and (1) of the Act (Pet. App. 21a-36a).

6. The court of appeals (Pet. App. 1a-18a) enforced the Board's bargaining order. The court ruled that, in conducting the representation election, the Board's Regional Director "properly weighed the competing interests" in deciding to hold the election by mail ballot, noting that "[b]ecause the employees involved worked a variety of shifts in scattered locations, a mail ballot was the only practical way to secure votes in a reasonable amount of time, and could best be expected to insure

fairness and the broadest participation possible in the vote" (Pet. App. 8a). The court also recognized the substantial interest in the finality of representation proceedings, and held that an election by mail is not *per se* invalid whenever a potentially decisive number of votes, no matter how small, becomes lost in the mails. The court concluded that such a rule would unduly deter use of mail balloting in cases such as the present one, where election by mail makes it possible for more employees to participate in the voting process (Pet. App. 9a).

The court also rejected petitioner's argument concerning the efficacy of the transfer of the IAPD affiliation from MEBA to the Carpenters. As to the adequacy of notice and time for consideration prior to the July 11 meeting, the court determined that (Pet. App. 10a-11a)

> the members received mailed notice that was not misleading and that complied with the [IAPD] by-laws and constitution * * *. Over one-third of the union attended the quarterly meeting. Of the 78 members voting, all but one approved disaffiliation from the MEBA, and all but two approved the transfer of affiliation. The record offers evidence of some discussion among the members * * *, [t]he members' right to a secret ballot was adequately protected, and the majority of members voting, as well as the majority of employees in the bargaining unit, have offered no complaints or opposition to the transfer of affiliation.

The court further noted that, following the July 11 meeting, the September secret mail ballot poll of the unit members showed that a clear majority of petitioner's employees favored the change (Pet. App. 5a-6a).

The court also rejected petitioner's argument that "Local 1012 is not merely the IAPD with another name, but an altogether new and different bargaining agent" (Pet. App. 13a), holding that the "record fails to show any substantial difference between the IAPD and its successor that would support the conclusion that Local 1012 is a genuinely different organization" (*ibid.*). The court found substantial evidence to support the conclusion of the Board that the IAPD's switch in affiliation from MEBA to the Carpenters did not constitute a fundamental alteration of the representative, noting (Pet. App. 15a-16a) that the differences between IAPD and Local 1012 are "superficial" and that "the autonomy, dues structure, and leadership of the IAPD remained unchanged after July 11, 1975, despite its change in identity."

ARGUMENT

Petitioner contends that the court of appeals erred in finding that the Board acted within its discretion by certifying IAPD-MEBA as its employees' representative and by subsequently amending the certification to reflect the "current name and affiliation of the certified union" (223 NLRB at 860). The court's decision was correct, it creates no conflict among the circuits, and further review is unwarranted.

1. Petitioner contends that the initial certification of IAPD-MEBA was improper and that the Board abused its discretion in failing to set aside the mail ballot election because the votes of three of more than 80 eligible voters were lost in the mail. It is well settled, however, that the Board possesses a "wide degree of discretion" in representation matters. *National Labor Relations Board* v. *A.J. Tower Co.*, 329 U.S. 324, 330; *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767; *National Labor Relations Board* v. *Waterman*

Steamship Corp., 309 U.S. 206, 226. Here, use of the mail ballot procedure was virtually compelled by the fact that the off shore divers in the bargaining unit were widely dispersed; to hold the election in any other manner would have resulted in employee participation significantly lower than the more than 90% participation achieved here. See, *e.g., National Labor Relations Board* v. *Groendyke Transport, Inc.*, 372 F. 2d 137, 141-142 (C.A. 10), certiorari denied, 387 U.S. 932. And, as the court of appeals noted (Pet. App. 9a), if a mail ballot election must be set aside whenever a small number of potentially decisive ballots is not returned, the use of mail ballots would be unduly deterred. On the facts of this case, the Board acted within its "wide degree of discretion" (*National Labor Relations Board* v. *A.J. Tower Co., supra*) in certifying the results of the election. Petitioner cites no authority to the contrary.

2. Nor is there merit to petitioner's contention (Pet. 7-13) that the court of appeals' affirmance of the Board's amendment of the certification conflicts with the decisions in *American Bridge Division, United States Steel Corp.* v. *National Labor Relations Board*, 457 F. 2d 660 (C.A. 3); *National Labor Relations Board* v. *Bernard Gloekler North East Co.*, 540 F. 2d 197 (C.A. 3), and *National Labor Relations Board* v. *Bear Archery, Division of Victor Comptometer Corp.*, 95 LRRM 3094 (C.A. 6). (Pet. 37a-38a.) In each of those cases, single-unit independent unions affiliated themselves with large international unions, thus creating "situations involving significant changes in the actual identity of the representatives and a diminution in the rights of the bargaining units' members without a Board-sponsored election." *American Bridge division, supra*, 457 F. 2d at 665. Here, in contrast, the change simply involved a switch of international union affiliation: the autonomy of the local leadership under the prior affiliation remained intact under the new

affiliation, and there was no change in the rights or responsibilities of the members of the unit (223 NLRB at 859). See, *Carpinteria Lemon Association* v. *National Labor Relations Board*, 240 F. 2d 554, 557 (C.A. 9), certiorari denied, 354 U.S. 909.

Moreover, the voting procedures found to be objectionable in *American Bridge Division* and *Bear Archery* were quite different from those employed in the present case. As the court of appeals here recognized (Pet. App. 12a n. 6), the union officers in *American Bridge Division* ignored requests of the members for a further meeting to consider and debate the affiliation proposal;[3] no such situation occurred here. Moreover, unlike *American Bridge*, a mail ballot poll was taken among unit members that resulted in an overwhelming ratification of the new affiliation. This confirmed the result of the vote at the meeting on July 11, when the affiliation was originally approved. The court of appeals also recognized that the facts here were very different from those in *Bear Archery*, where no prior discussion was held before the vote, and the final vote took place in the presence of an officer of the proposed international affiliate and in such a manner that "doubt was cast on the secrecy of the balloting process" (Pet. App. 12a n. 6).[4]

---

[3]In *American Bridge*, the union leadership cut off debate within the union by turning down a demand by a substantial group of dissenting members for a special meeting to further consider reaffiliation. 457 F. 2d at 665-666.

[4]Contrary to petitioner's assertion (Pet. 9) that a representative of the Carpenters spoke to the union membership at its July 11 meeting prior to the voting, the Carpenters representative was excluded from the meeting until after all the votes were taken (223 NLRB at 858). Similarly, there is no factual basis for petitioner's assertion (Pet. 9) that the votes at the July 11 meeting "were taken with no semblance of * * * secrecy" (see 223 NLRB at 858).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

ROBERT E. ALLEN,
Acting Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board.

SEPTEMBER 1978.

DOJ-1978-09